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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 585

MRS. OSCAR C. DOTY, et al, *Appellants,*

vs.

J. S. LOVE, Superintendent of Banks of the State of Mississippi, *Appellee.*

Appeal from the Supreme Court of the State of Mississippi.

BRIEF OF APPELLEE.

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TUCKER PRINTING HOUSE JACKSON MISS

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Appeal from the Supreme Court of the State of Mississippi.

BRIEF OF APPELLEE.

THE CASE

This is an appeal by Mrs. Oscar C. Doty, et al., from a Judgment rendered by the Supreme Court of Mississippi affirming a decree of the Chancery Court of Lee County, Mississippi, entered on the 17th day of May, 1933, authorizing the reopening of the Peoples Bank & Trust Company on terms and conditions in the said decree contained.

STATEMENT OF FACTS

The Peoples Bank & Trust Company, of Tupelo, Mississippi, a state bank, organized under the laws of the State of Mississippi, was closed for liquidation on December 24, 1930, and in accordance with the laws of Mississippi was turned over to the Superintendent of Banks of the State for liquidation. The Superintendent of Banks was the head of the State Banking Department of the State of Mississippi, and under the law was charged not only with the duty of supervising banks, but also with the duty of liquidating insolvent banks. Chapter 85, of the Mississippi Code of 1930, is devoted to banks and banking and together with Chapter 251 of the Laws of 1932 sets out the law relating to banks as it existed at the time of the rendition of the decree from which this appeal is prosecuted. Section 3817, of the Code of 1930, outlines the procedure for the liquidation of banks. In effect it required the Superintendent of Banks to submit the affairs of the bank by petition to the Chancery Court of the County of the domicile of the bank, and provided that thereafter the liquidation should proceed under the orders of that court. Under it a liquidation was really a receivership with the Superintendent of Banks as the statutory receiver.

At the time this bank was closed, it had book assets of $2,477,114.78. It owed bills payable and rediscounts amounting to $457,500.00, principal sum, and secured by about $800,000.00 of the best assets as collateral. It also owed about $200,000.00 for public moneys on deposit, which under the law of Mississippi, were preferred claims. All of these amounts had to be paid before the proceeds of any collections were available for dividends to common creditors and depositors.

The bank had its principal office at Tupelo, and branches at Nettleton and Rienzi. Shortly after the bank was closed, public meetings of the depositors were held and a Depositors' Committee formed of three depositors from the parent bank and a like number from each of the branches. This Committee continued to function as representatives of the depositors generally until the bank was later reopened as hereinafter set forth. (R-33-35).

In the fall of 1932, a movement to reopen the bank was initiated by a large majority of the larger depositors of the bank. (R-70). In this they had the cooperation of the Liquidating Agent and a representative of the State Banking Department assigned for that purpose. (R-71).

After all bills payable and claims for public moneys had been paid, in the early part of 1933, this movement was given serious consideration. (R-71).

Chapter 251, of the Laws of 1932, authorized the Superintendent of Banks of the State of Mississippi to reopen any closed bank with the approval of the Chancery Court of the county in which it was situated, when at least three-fourths of the general depositors and

creditors therein, either in number or amount, agreed to the reopening thereof and signed what was termed a "Freezing of Deposits Agreement."

As an outgrowth of the movement initiated by the depositors and the Depositors' Committee, a Depositors' Agreement was generally circulated among and signed by the depositors of the bank. A copy of this agreement was made "Exhibit 2" to the petition hereinafter referred to and may be found on Pages 15-17 of the Record. This agreement was signed by holders of in excess of three-fourths of the deposits. (R-73). By this agreement it was provided that the bank was to be reopened under such plan as might be approved by the Superintendent of Banks and the Chancery Court of Lee County, Mississippi, or the Chancellor in vacation, and the Directors of the Bank. The general plan was set out in the Depositors' Agreement without enumeration of the many necessary details which had to be left for the Superintendent of Banks to work out, subject to approval of the Chancellor. It provided that the Depositor or Creditor signing was to receive from the reopened bank 25% of the balance owing him, 5% to be paid on the date of the reopening and the remaining 20% in installments of 5% when the collections on the assets taken over by the reopened bank should equal that amount. It was further stipulated that the remaining 75% was to be charged against the account of such creditors so as not to be a charge against the reopened bank but to be set up in a special account to benefit from a trust fund to be created from the remaining assets and termed the "Pool Account." It further provided that the Superintendent of Banks was to put into the reopened bank a sufficient amount of assets from the old bank to insure the collection therefrom of suf-

ficient funds to pay the 25% assumed by the reopened bank, and the remainder of the assets of the old bank was to be placed in said special fund known as "Pool Assets," to be handled in trust by the bank under the jurisdiction of the Chancery Court and subject to the supervision of the Superintendent of Banks for the pro rata payment of the 75% of claims of creditors set up in the special account.

The Depositors' Agreement further provided that the bank was to be reopened with a capital of not less than $35,000.00 and in consideration of such stockholders as should pay in cash 50% of the amount of their stock in the old bank to form capital for the reopened bank, and their continuing liable for a like amount as stockholders in the reopened bank, such stockholders were to be relieved from further liability to the depositors of the bank in liquidation. Such stockholders as did not comply with this condition and pay in 50% of the amount of their stock for new capital and become stockholders in the reorganized bank, should remain liable for the full amount of their stock which was to become a part of the pool assets to be administered in trust for the 75% of claims set up in the special account. Section 8 of the Depositors' Agreement gave the Superintendent of Banks general authority to act for creditors in carrying out details of the plan, subject to the approval of the Chancery Court.

After the Depositors' Agreement had been generally signed as above stated, the Superintendent of Banks of the State of Mississippi, on May 4, 1933, filed a sworn petition in the Chancery Court of Lee County, Mississippi, in the cause in the said court, in which the liquidation of the bank was being administered. This petition

set out the plan for the reopening of the bank, and may be found on Pages 1 to 21 of the Record. There were attached to the petition as exhibits statements showing the condition of the bank at the time of the closing, status of liquidation at time petition was filed and as the bank would be under the reopening plan. The petition recited that more than three-fourths of the depositors, as provided in Chapter 251, of the Laws of 1932, had signed the Depositors' Agreement, and in the judgment of petitioner the bank could be reopened under the plan proposed as a solvent institution and that the provisions of said Chapter 251 had been complied with, and prayed for the approval of the Chancellor and a decree authorizing the reopening of the bank.

The petition further recited that not only had the terms of said Chapter 251, Laws of 1932, been complied with, but that also the plan for the reopening of the bank was to the best interest of the depositors and creditors of the bank, and that more would be realized for them by the reopening of the bank according to this plan than could be realized from a continuation of the bank in liquidation; that the entire matter was then in the hands of the court in virtual receivership, and the only source to which the depositors and creditors could look for the payment of their claims was the assets of the bank then being administered under the jurisdiction of the court. The petitioner offered to make proof that such plan was to the best interest of all depositors and creditors and recited that should the court be satisfied that such was true, it should, acting for the depositors and creditors of said bank, authorize the reopening, and that the court had the power so to do, as being to their best interest, and bind them by the decree.

The petition alleged that there were approximately 5,000 depositors and that the number was so great that it would be impossible to personally serve each of them with process and give them notice of the hearing of the petition, but that the interests of the general depositors and creditors were common and that which was to the best interest of the depositors and creditors as a class was to the best interest of each depositor and creditor; that it was the duty of the court to enter such decree as would be to their best interest as a class and such interest would be protected by bringing into court representatives of such classes, as parties respondent. The petition prayed for the setting of a day in vacation for hearing (as was authorized by the statute), the selection of a reasonable number of depositors and creditors as representatives of a class, and that process be ordered to be served upon them to show cause why the prayer of the petition should not be granted. (R-12).

By decree of date May 4, 1933, (R-22 and 23) the hearing was set for May 15, 1933, and the court selected fifteen depositors and creditors upon whom process was directed to be served personally and further directed that publication be made of notice to all parties interested to appear on the hearing and show cause why the petition for authority to reopen the bank should not be granted. This was duly published and proof of publication made. (R-23 and 24).

In addition to the petition of the Superintendent of Banks a supporting petition was filed by the Depositors' Committee signed by all members in which they approved the plan submitted in the petition filed by the Superintendent of Banks, and asked that the court enter an order for the reopening of the bank as prayed for in his petition.

Process was served upon Mrs. O. C. Doty, as directed in the decree, and she appeared and filed objections. Process was not directed to be served upon Mrs. Nannie McCarty but she voluntarily appeared at the hearing, asked leave to, and filed objections. Their objections were ultimately consolidated and were based in the main on abstract principles of law. Such objections as went to concrete matters of fact were not supported by evidence. They merely stated the objections without undertaking to prove that the plan was not for the best interest of the depositors, or that they would suffer thereby. The hearing was had May 15, 1933, by agreement of all parties. (R-68).

On the hearing of the petitions of the Superintendent of Banks and the Depositors' Committee evidence was introduced from the Liquidating Agent who had been in charge of the bank since it closed, and the Special Representative of the State Banking Department who had been assigned to this matter, and the plan for the reopening was explained in detail. In substance, it was that the bank was to be reopened carrying in its statement liabilities for the payment of 25% of the outstanding deposits and indebtedness of the closed bank, to be paid 5% on reopening and the balance in installments of 5% as rapidly as collections should be made from assets placed in the reopened bank. There were to be set over to the reopened bank to balance these liabilities assets of value equal to the liabilities to be assumed by the reopened bank. It was shown that this was to be done by setting over to the reopened bank assets of greater face value than the amount of liabilities that was imposed upon said bank, but the exact true value of which could not be determined. Out of these assets the reopened bank was to collect only to the extent of

the liabilities imposed upon it and the balance was to go to the pool account for the payment of the 75% of the deposits and indebtedness not assumed as a liability by the reopened bank. (R-78). This balance has been commonly termed equity for pool assets. The reason given for doing this was that no one could tell with exactness the real value of the assets. That some of the assets were only partially secured, and as to some the same security was held for a number of notes and it was impossible to separate them. (R-75).

The capital stock of the reopened bank was to be $55,000.00, which had been provided by stockholders in the closed bank paying in 50% of the amount of their old stock, as provided by the depositors' agreement. A surplus of $35,000.00 and reserve of $10,000.00 for the reopened bank was to be provided by placing in the bank these amounts of assets in addition to the liability assumed for deposits and indebtedness, but the reopened bank was to repay these amounts to the pool account by paying $7,500.00 per year from the earnings of the bank until these sums had been repaid. (R-97). This was in effect the same as the depositors providing $45,000.00 for preferred stock in the bank to be repaid to the pool account at the rate of $7,500.00 per year from the earnings of the bank. This was much the same as the Reconstruction Finance Corporation has done since in taking preferred stock in banks.

The evidence showed that the expense of the liquidation up to that time had been $21,000.00 more than the income on the assets of the closed bank, and that the per dollar expense of future collections by liquidation would be two or three times higher than theretofore on account of the fact that the assets more readily col-

lectible had been realized upon. This cost would have been a loss to the depositors under a continuation of the liquidation, but under the proposed plan the 25% was to be collected by the bank without cost in excess of the earnings from such assets, thereby effecting a saving, and the 75% or pool assets at a cost of 10% of the amounts collected, such pool assets to have full benefit of all earnings on or from such assets. The evidence further showed that the depositors would realize from 10% to 25% more on their claims by reopening the bank than they would by a continuation of the liquidation; that the total amount of stock liability which might possibly be expected to be realized from enforced collections over a period of years would be about $70,000.00 or about sufficient to pay a 5% dividend to depositors, and that while under the plan this was to be released as to such stockholders as should pay 50% of the amount of their old stock to provide capital for the reopened bank, the advantage of the plan more than compensated for it in that they would gain from 10% to 25% more dividends under it than they would through a continuation of the liquidation. (R-99). Under the plan $15,000.00 to $20,000.00 had been collected from stockholders in excess of what the Liquidating Agent had expected he could collect in liquidation. (R-93). This evidence was not controverted and was accepted as true by both courts below.

After hearing the evidence and the plan explained four of the nine objectors withdrew their objections and two others did not appeal. The court adjudged that the plan for the reopening of the bank was fair and equitable and that the best interest of the depositors and creditors would be promoted thereby. A decree was rendered authorizing the Superintendent of Banks to

reopen the bank upon the plan submitted. It directed that the bank be reopened and charged with liability for 25% of the deposits and indebtedness, the several amounts of which were set out in detail, to be paid 5% in cash upon reopening and the balance in installments of 5% as rapidly as collections could reasonably be made from assets placed in the reopened bank and the court reserved the right to inquire into the progress being made in such payment and to make such further orders directing payment as might appear to the best interest of the creditors. It further directed that certain assets be set over to the reopened bank from which it was to collect a certain fixed amount which was equal to the liability imposed upon it, after which the remainder of such assets was to be transferred to the pool account for the payment of the 75% not imposed as a liability on the reopened bank. The provisions that all amounts collected above the amount of the liabilities assumed were to be held for the benefit of the 75% of deposits not assumed was clearly and repeatedly written into the decree.

The decree further provided that all assets not placed in the reopened bank and the balance on those placed therein after the collection of the amount equal to the liability imposed, should be held by the bank in the pool account to be managed in trust under the jurisdiction of the court. (R-54). This was in accordance with Section 4 of the Depositors' Agreement. (R-15). The 75% of liability not assumed was to be a charge against this account. (R-55). The reopened bank was directed to file an inventory of such assets in the Chancery Court of Lee County, Mississippi, and submit itself to the jurisdiction of said court for the handling of same in trust, and likewise to file with said inventory a

list of the *cestui que trustents* of said fund and the amounts for which they were severally entitled to participate, being the 75% of their claims not assumed by the reopened bank. The decree also directed the bank to make annual accounts of the trust to the court, naming the Superintendent of Banks as the Agent of the court to supervise the trust with power to examine said fund and assets and act to safeguard the interest of the creditors. (R-55-56). Many other provisions were made in the decree relative to the details of this matter which are not deemed necessary to state herein; but suffice it to say, the court made elaborate provisions in the decree for the interest of the creditors in every way that might reasonably have been foreseen.

This proceeding was before the Chancellor under whose jurisdiction all proceedings relative to the liquidation of the closed banks had been taken for more than two years. These matters were judicially before him and in reaching the conclusion that the plan was to the best interest of the creditors, the Chancellor had not only evidence actually adduced on the hearing, but also, his knowledge of the course of the proceedings theretofore, and for that reason his findings are entitled to the greater respect.

From the decree rendered three of the objectors appealed to the Supreme Court of Mississippi, but one of whom, and in whose name the case was there styled, Mrs. B. L. Dunn, dismissed her appeal before a decision was reached. There remained as appellants, Mrs. O. C. Doty and Mrs. Nannie McCarty.

The decree of the lower court authorizing the reopening of the bank was affirmed by the Supreme Court of the State of Mississippi. The two appellants remain-

ing have appealed to this court, and the case is now here for consideration. The appeal from the lower court was without supersedeas and the bank was permitted to reopen. The appeal from the Supreme Court of Mississippi was likewise without supersedeas and the case is now before this court on the matter of a decree authorizing the reopening of a bank now nearly two years after it became effective.

ARGUMENT

Since counsel for appellants have not furnished us copy of any brief which they may have filed, we necessarily are limited in our argument to a discussion of the points stated by them as the ones to be relied upon in the consideration of this appeal. In the statement of points to be relied upon by appellants found on pages 167-8 of the Record, appear two contentions made by them. We quote these contentions, as follows:

(1) "That Chapter 251 of the Laws of the State of Mississippi, 1932, as construed by the Supreme Court of the State of Mississippi rendered in said cause is obnoxious and repugnant to and in violation of paragraph 1 of Section 10 of the Constitution of the United States; in that, the construction placed upon said Chapter 251 of the Laws of the State of Mississippi, 1932, the decree entered in said cause by the Chancery Court of Lee County, Mississippi, and the judgment of the Supreme Court of the State of Mississippi affirming said decree impairs the obligation of the contracts theretofore existing between appellants and Peoples Bank & Trust Company, Tupelo, Mississippi, a banking corporation organized and existing as such under and by virtue of the laws of the State of Mississippi."

(2) "That Chapter 251 of the Laws of the State of Mississippi, 1932, the decree entered in said cause by the Chancery Court of Lee County, Mississippi and the judgment of the Supreme Court of the State of Mississippi affirming said decree deprives these appellants of their property without due process of law; and, denies these appellants the equal protection of the laws in violation of paragraph 1 of the Fourteenth Amendment to the Constitution of the United States."

We shall confine our discussion to these two points.

I.

THE RIGHTS OF APPELLANTS BEFORE ENACTMENT OF THE REOPENING STATUTE.

In order that we may approach intelligently the questions involved, it seems necessary to examine the rights of the complaining depositors as they existed at, and before, the enactment of Chapter 251 of the Laws of the State of Mississippi of 1932, commonly known as the "Re-opening Bank Statute," which is assailed as unconstitutional by the appellants.

When appellants made their respective deposits in the Peoples Bank & Trust Company of Tupelo, Mississippi, they entered into a contract with it whereby the bank obligated itself, while open, and before liquidation, to repay the amount of the respective deposits on demand. This contract, however, had written into it, as a part thereof, the law then in force providing for the liquidation of banks. Upon the insolvency of the bank, and its closing for liquidation, under the statute, the appellants then, and thereafter, had the right only to their proportionate share of the assets in the liquidation after payment of expenses and secured, or preferred,

claims. The law then in force governing liquidation of banks, was enacted in 1914, and with amendments is found in Chapter 85, Mississippi Code 1930. Section 3582 of that Code made it the duty of the Superintendent of Banks, upon finding that any bank was insolvent, forthwith to liquidate the same as provided by law. On December 24, 1930, by reason of insolvency, the Peoples Bank & Trust Company, was, by the Superintendent of Banks, in accordance with the statute just referred to, closed for liquidation, and the liquidation thereof submitted to the jurisdiction of the Chancery Court of Lee County, Mississippi, as provided by Section 3817 of the said Code. Said Section 3817 will be found in Appendix A hereto.

This having been done, under the law, at that time, three courses were open for handling the assets of the liquidation. The first of these was to proceed in the usual and ordinary method to convert the assets into cash, and pay the creditors and depositors in accordance with their respective rights, paying unsecured depositors pro-rata, if the assets in liquidation did not yield sufficient to pay all in full. Another method authorized by said Section 3817 of the Code was for the Superintendent of Banks, with the consent of the Court, to sell any, or all, of the property of the liquidation, whether at private or public sale, and convey such property to the purchaser, and with the funds so received make distribution to the ones entitled thereto. This sale might be either for cash, or on credit. Another, and the third method of disposing of the assets belonging to the liquidation was afforded by Section 3792 of the Code, wherein it was provided that the Superintendent of Banks should have the power and authority, by and with the consent of a majority of the directors of a closed bank,

to sell all assets of a bank in liquidation to any solvent existing bank, at such price as the Superintendent of Banks might consider fair, allowing the purchasing bank to assume the amount due all creditors of the liquidating bank. If this method was used the Superintendent of Banks must require the purchasing bank to execute a bond for the benefit of the creditors; and if the purchasing bank failed to pay any creditor the amount of his claim, such creditor had a right of action in the name of the Superintendent of Banks against the purchasing bank and the surety on its bond.

There is nothing in the record to show, or indicate, that the third method of liquidation, mentioned hereinabove, was available in relation to the affairs of the Peoples Bank & Trust Company, and no question has been raised arising out of any supposed rights of any depositor under said Section 3792. We, therefore, dismiss this method of liquidation without further discussion thereof.

From the foregoing it will be seen that the sole right of the appellants in the liquidation proceedings, and in the assets of the liquidation, was to have their respective proportionate shares of the assets realized from the liquidation, carried on in one of the statutory methods provided therefor.

The statutes referred to above were construed by the Supreme Court of Mississippi in the case of *Christensen v. Merchants & Marine Bank of Pascagoula,* 168 Miss. 43, 150 So. 375 (1933), wherein, among other things, it was held by the court that the contractual rights of depositors of a bank are to be determined, not only from the terms of the agreement actually entered into between the parties, but also that they are subject

to laws then existing, or that may be thereafter lawfully enacted. In that case the Supreme Court of Mississippi in discussing the rights of depositors of banks in liquidation, on page 58 of the official report, stated:

> "Depositors, or other creditors of a bank in liquidation, are not entitled to the payment of their claims as preferred claims, unless such claims were preferred claims before the liquidation. They cannot obstruct the liquidation, by such tactics, and be preferred over creditors who are willing to consent to the reasonable plans of reorganization. They must wait for their money until it is realized in the liquidation proceedings, or until sufficient money is realized to pay all creditors in full, or a portion of their demands to be determined by the Superintendent of Banks and the Chancery Court. They have no absolute right to be paid until the liquidation proceedings have realized sufficient money to pay them and the other creditors without giving them any preference over other creditors."

It, therefore, appears that the right of the depositor as to his claim against the bank after its closing for liquidation, were qualified by the provisions of the law. His right to demand repayment in full which had theretofore been personal, and for which he could maintain an independent action, thereafter became communal, and his rights were merged with those of other creditors as a class, and he could recover his deposit only pro rata with other creditors as dividends were directed to be paid by the court. The extent of recovery was limited by the then existing law, to the pro rata share of what might be realized out of the assets of the insolvent bank. Such assets as the bank had when it closed were all that it ever could have unless some provision were made

for its reopening. It is a distinctive feature of a banking corporation that it cannot lawfully operate while insolvent. If it cannot engage in business it cannot acquire further assets from which the claims of its depositors may be paid. An individual can engage in business, although insolvent, and thereby acquire further property to which his creditors may have recourse, or his assets may be increased by inheritance. Likewise, a commercial corporation may engage in business, although insolvent, and increase its assets. This a bank is prohibited from doing, both by the laws regulating the business of banks, and by the criminal laws of the state. Furthermore, the nature of its business is such that the public will not deal with it if insolvent. It is, therefore, clear that it can neither earn nor inherit, and thereby acquire further assets. It would be idle to say that the creditor has the abstract right to resort, not only to the present assets of the bank, but also to its future acquisitions, for the reason that it can have none.

II.

CHAPTER 251, LAWS OF 1932, IS A PROCEDURAL STATUTE.

Bearing in mind that the banking business is one in which the public is interested, it is well, in approaching a discussion of a statute enacted to regulate the same, for the situation existing at the time of the enactment to be known. It is a matter of common knowledge, of which the court will take judicial notice, that beginning in 1929 and extending beyond the year 1932, there was a nation-wide business depression, to such an extent that the sale value of all property almost disappeared, resulting in the failure and bankruptcy of many business concerns and individuals and the closing of many banks

throughout the nation. In Mississippi, as a result of this economic condition, scores of banks had been forced to close their doors and go into liquidation, with consequent enormous losses to hundreds of stockholders and many thousands of depositors. When the legislature of 1932 met it was faced with this situation, and undertook to ameliorate this condition by the enactment of the challenged statute. As stated before, scores of banks, including the one whose affairs are under review here, were in liquidation. Experience had shown that liquidation in any of the three methods then and theretofore authorized under the law had not been productive of satisfactory or helpful results. Collections could not be made by liquidating agents, and if the property of the liquidation was offered for sale no purchasers were available, willing and able to buy at a fair or reasonable price. A sale under the then existing methods could have resulted only in a sacrifice of the assets out of which the depositors were to be paid. Everyone knew of this condition, and the legislature sought to give relief to the great numbers of the public who had their funds tied up in banks in liquidation. The statute here under review was the answer to that situation. It is simply an added or cumulative method of realizing on the assets of a closed bank. It takes nothing from the depositors but gives them, if 75% in number or in amount of deposits ask therefor, a new method of liquidating the assets.

This law, in effect, provides that the Superintendent of Banks is authorized to re-open any closed bank, that is to say, any bank in liquidation, but before doing so his action must have the approval of the Chancery Court of the county in which the bank is situated, and at least three-fourths of the general depositors and creditors

therein, or depositors and creditors owning at least three-fourths of the deposits in or claims against the bank, must agree to the re-opening of the bank, and sign an agreement to accept repayment of their claims over a period of years, for the full or a lesser amount, and with or without interest. The act also provides that the Superintendent of Banks, before re-opening any bank, must be convinced that it is in a solvent condition and can pay the amounts agreed to be paid to the creditors. But, before the bank can be re-opened, the plan therefor and all the facts in connection therewith must be submitted to the Chancery Court and a decree obtained approving the plan agreed upon and authorizing the bank to re-open.

The statute also provides that if conditions above stated have been met, depositors and creditors who have not agreed to the plan shall be bound thereby, except that public depositors and those holding preferred or secured claims, or correspondent banks holding bills payable of the closed bank, shall not be so bound; proper provision must be made in the plan for the payment of these excepted creditors, but the statute specifically provides that such arrangement shall not operate prejudicially to the rights of the general depositors and creditors of the bank. Since there were no such creditors of the excepted classes of the bank here involved, this provision of the law is not before the court.

It is also in the act provided that the Superintendent of Banks shall have no right to diminish the assets of a closed bank to the prejudice of depositors and creditors, and that any assets charged out shall be held by the bank and collected for the benefit of its depositors and creditors.

The act simply provides, as stated before, an additional method of liquidation through the bank re-opened, and does not provide in any way for the taking of any asset, to which a depositor has a right to look for payment of his claim, away from the liquidation, or to deprive any depositor of any right to the assets of the liquidation.

This statute is not mandatory. It merely provides fuller and more adequate procedure for the relief of depositors and an alternative method of completing the liquidation of closed banks. It will be noted from the language in the beginning "that the Superintendent of Banks be authorized to re-open any closed bank," that it merely gives authority. It did not supersede the liquidation statute then in force, being Section 3817 of the Code of 1930, but complements it. It furnishes an additional method of procedure in liquidation to be availed of on the condition of the agreement of 75% of the depositors thereto. The two statutes are in *pari materia*. They relate to the same subject matter, and to the same classes of persons or things, and have a common purpose. Chapter 251 of the Laws of 1932 did not take away anything of the remedies theretofore afforded the depositors in closed banks under Section 3817. The depositors' contract was not impaired, and neither was the remedy. On the contrary an additional remedy was given. It is the fundamental rule of law that a state may alter, enlarge, modify, or limit existing methods of procedure and substitute or provide others without impairing contracts, if a sufficient one be left or provided. *Memphis v. United States*, 97 U. S. 293, 24 L. Ed. 920. *Vial v. Penniman*, 103 U. S. 714, 26 L. Ed. 602. *Oshkosh Water Works Company v. Oshkosh*, 187 U. S. 437, 47 L. Ed. 249.

The Supreme Court of Mississippi has held to like effect in the case of *Love v. Mangum,* 160 Miss. 590, 135 So. 223, where the court said:

> "Generally citizens of the State have no vested rights in the existing laws of the State which will preclude their amendment or repeal. There is no implied promise of the State to protect its citizens against incidental injuries occasioned by change in the laws."

The Supreme Court of the United States has recently held that there is no property right in a constitutional sense in any particular form of remedy. *Gibbes v. Zimmerman,* 290 U. S. 326, 78 L. Ed. 342.

The additional remedy did not deprive anyone of due process of law. It was elective on the part of the depositors as to whether or not they should use it, and it still remained a judicial procedure.

This remedy gave to the depositors rights in the liquidation which they had not theretofore enjoyed. When the bank was closed their right of individual action was merged into that of the class, and they all shared alike, and were bound alike by the action of the Court, and the Superintendent of Banks as the statutory liquidator and *quasi-receiver.* Under this new statute they were given a right, acting through the 75% majority, to affect the liquidation, but the first step must be on the part of the depositors. Three-fourths of them must first agree on a plan. Until this was done the law does not go into operation. Even then, it was not the absolutely controlling factor and the 75% were not empowered to arbitrarily enforce their will on the minority. It did not take the matter out of the hands of the Superintendent of Banks or the Chancery Court.

It was next provided that the Superintendent of Banks must be satisfied that the plan was sound. The law reads:

> "Providing the Superintendent of Banks is convinced that such bank is in a solvent condition and can repay the depositors the amount of their deposits in accordance with the terms of the agreement for the repayment of same."

The agreement of 75% of the depositors and the approval of the Superintendent of Banks must be had, but yet this does not put the law into operation. Only after this had been done could it be presented to the court having jurisdiction over the liquidation by verified petition submitting it to the court for action. The law then recites:

> "But before any such bank shall be re-opened the entire plan for the re-opening of same and all facts in connection therewith, shall be submitted by the Superintendent of Banks to the Chancery Court of the County in which the bank is situated, or to the Chancellor in vacation by proper petition duly verified, such petition to contain a statement of the assets and liabilities of the bank, and such other information as may be necessary to convey to the court, or chancellor, the true facts with reference to the condition of such bank, and a decree of the court, or the chancellor in vacation, obtained approving the plan agreed upon for the re-opening of such bank, and authorizing same to be re-opened."

The court here acts for all of the creditors and must approve the plan before it can become effective. There could be no reason for submitting it to the chancellor except that he is to protect the interest of the other

creditors. The presumption of law is in favor of honesty, integrity and proper action on the part of the court, and that it will act for the best interest of all parties. It then becomes a judicial matter. The issue is whether or not the proposed plan is for the best interests of the creditors of the closed bank. It was clearly the intention of the law to give the court the power to render a decree authorizing the re-opening of the bank only where the proof before the court was that it was to the best interest of the creditors that this be done. The statute requires that a decree approving the plan must be obtained. It will be remembered that this decree is to be obtained from the chancellor whose decrees are presumed to be equity. Wherein could the rendering of equity to a depositor impair his contract?

It would be hard to conceive of a law where more safeguards were afforded for the protection of the minority than in this case. All rights of the depositors, under the law, at the time of the closing of the bank remained in full force and effect, and all remedies and means of enforcing such rights that existed at that time still remain, except the right of dissenting depositors to contend for final liquidation of the bank through the court contrary to the finding of the court that the plan for re-opening was for the best interest of all parties, and that more would be realized by them under such plan than through the strict adherence to the old plan of liquidation to the last dollar. It is doubtful whether, under the law, as theretofore provided, the depositors had any such right, as the court had the inherent power to so conduct the liquidation in the winding up of the affairs of the closed bank as not to have all of the assets consumed in costs and expenses for such proceed-

ings, and for this purpose could have ordered all of the assets, to say the least of it, all of a slow and doubtful nature, sold *in solido*.

If such a right existed under the old law, and which is doubtful, taking away this right from them, could not possibly be construed as an impairment of any contract they had, but in the light of reason and common sense must be considered only a change of remedy. It is clearly the law that a remedy may be changed provided the new one substituted is equally effective as the old one, and where it is shown, as in this case, that the remedy given by the new statute will produce more for the depositors than the old remedy, it can not be held to be an impairment of the contract, and neither can it be held to be a less efficient and useful remedy.

III.

CHAPTER 251, OF THE LAWS OF 1932, IS CONSTITUTIONAL AS AN EXERCISE OF POLICE POWER.

We respectfully submit that the enactment of Chapter 251, of the Laws of 1932, was a valid exercise by the Legislature of the police power and the right to legislate for the general welfare, which right is unabridged by its incidental effect upon private contracts.

Banks are Corporations of Quasi Public Nature. In the case of *Bank of Oxford v. Love*, 111 Miss. 699, 72 So. 133, the Court had under consideration the act establishing a banking department in Mississippi. In the course of the decision it was said that it is settled by the decisions that the banking business is affected with a public use, and that it is within the power of the Legislature to enact laws under the police power regulating

the banking business. In support of this statement, a number of cases from the Supreme Court of the United States were cited, including that of *Noble State Bank v. Haskell,* 219 U. S. 104, 54 L. Ed. 112. In that case there was involved the validity of the guaranty of bank deposits law of Oklahoma, which was attacked on the ground that it deprived the bank of its property without due process of law and impaired the obligation of contracts. The Court upheld the statute, and in the course of its opinion said:

> "The power to compel, beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end."

The Court held further that the enactment of the guaranty law by the legislature of Oklahoma was a valid exercise of the police power. The case of *Bank of Oxford v. Love,* supra, was carried to the Supreme Court of the United States where the decision of the Mississippi Supreme Court was affirmed in 250 U. S. 603, 63 L. Ed. 165. In this opinion the Court held that the power of the State to establish such reasonable and general regulations of banks as may be essential to public safety is a commonly recognized power.

The Supreme Court of Mississippi in the case of *Christensen v. Merchants & Marine Bank,* 168 Miss. 43, 150 So. 375 (1933) held:

> "Business of a bank is a public utility, or a business, for the public use, and the legislature has very comprehensive powers in dealing with and

regulating such business. *Noble State Bank v. Haskell*, 219 U. S. 104, *Shalenberger v. First State Bank*, 219 U. S. 114."

It is only arbitrary restraint and impairment of contracts and not immunity from reasonable regulations to safeguard the public interest that the State and Federal Constitution prohibit. *Miller v. Wilson*, 235 U. S. 373, 59 L. Ed. 628.

Contracts being subject to legislation enacted in the exercise of the police power, an act is not invalid because of its incidental effect upon them. *St. Louis Poster Adv. Co. v. St. Louis*, 246 U. S. 269, 63 Law Ed. 599.

Contracts must yield to the public welfare when the latter is appropriately declared and defined and the two conflict. *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 63 Law Ed. 309.

Where contracts are made by parties, either of whom, is subject to statutory regulation, the contracts must, of necessity, be subject to the exercise of the Sovereign Power of the State to enact legislation for the protection of the general welfare. *East v. Van Deman & L. Co.*, 240 U. S. 342, 60 L. Ed. 679.

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though the contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the Sovereign right of the government

to protect the lives, health, morals, comfort and general welfare of the people and is paramount to any rights under contracts between individuals." *Meningault v. Springs*, 199 U. S. 473, 50 L. Ed. 274.

This was followed in a later decision in *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 59 L. Ed. 1204, wherein the court said:

> "It is established by repeated decisions of this Court that neither of these provisions (the contract and due process clauses) of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to the health, safety, or general welfare, of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; that all contract and property rights are held subject to its fair exercise . . . . And it is also settled that the police power embraces regulations designed to promote the public convenience, the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety."

Neither the contract clause nor the due process clause is superior to the exercise of the police power of the state. *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 58 L. Ed. 721, *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835.

These principles with reference to the exercise of the police power by the state have been further confirmed by this court, in the case of *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413, wherein it is said:

"Not only is the constitutional provision qualified by the measure of control which the state retains over remedial process, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end, 'has the result of modifying or abrogating contracts already in effect.' *Stephenson v. Binford,* 287 U. S. 251-276, 77 L. Ed. 288. Not only are existing laws read into contracts to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while . . . . a government which retains an adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residium of state power has had progressive recognition in the decisions of this Court."

And the Court further quotes from *Long Island Water Supply Co. v. Brooklyn,* 166 U. S. 685, 692; 41 L. Ed. 1165, 1167:

"But into all contracts whether made between states and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations, and of the community to which the parties belong; they are always presumed and must be presumed to be known and recognized by all, or binding upon all and need

never, therefore, be carried into express stipulation for this would add nothing to their force. Every contract is made in subordination of them and must yield to their contract as conditions inherent and paramount, wherever a necessity for their execution may occur."

That the state has the authority to exercises such power is expressed in the following language from the case of *Home Building & Loan Association v. Blaisdell*, supra:

> "The economic interest of the state may justify the exercise of its continuing the dominant protective power notwithstanding interference with contracts."

We respectfully urge that the economic interest of the state not only justified, but even constrained the legislature to exercise this paramount sovereign power for the common good of the general public, even though private rights were thereby incidentally affected (which we say were not in this case). It is current history which has heretofore been recognized by this Court and other courts that since the latter part of 1929 the nation has been in a period of economic depression, which has even at times seemed to threaten the national existence. Congress took notice of this in enacting various recovery laws; such as, providing for the Reconstruction Finance Corporation, and numerous other agencies. The President has recognized it in proclamations. At the time Chapter 251, Laws of 1932 was passed a large number of banks in Mississippi had closed for liquidation, and various efforts had been made to cope with the situation and rehabilitate them. In many towns all of the banks had closed and were in liquidation. Commerce had been

impeded and prosperity impaired. Unemployment was at a high point. Banking was a public utility and an effective aid toward recovery. As evidence of this, we cite the fact that the lowest depth of the depression was when the banks of the nation were closed during the banking holiday proclaimed by the President. Furthermore, one of the first steps taken by the Congress and the National Government to recover from the condition of national depression was to reopen and rehabilitate the banks. For this purpose the Reconstruction Finance Corporation was authorized to render substantial financial assistance to the banks. Under such conditions, not only was there warrant for the exercise of the paramount sovereign power of the state in reopening banks for the common weal, even though private contractual rights might incidentally be affected thereby, but there existed an emergency which was national in its scope. The Supreme Court of the United States has held that in times of public emergency the police power of states is extended even beyond that in normal times. *Block v. Hirsh*, 256 U. S. 135, 65 L. Ed. 865, *Brown Holding Company v. Feldman*, 256 U. S. 170, 65 L. Ed. 877, *Levy Leasing Co. v. Siegel*, 258 U. S. 241, 66 L. Ed. 595.

This has more recently been recognized in the case of *Home Building & Loan Association v. Blaisdell*, supra.

On this question the Court of Appeals of New York held:

> "That the government may be required in times of public stress so to legislate as to nullify private contracts is an implied term of the law of every contract, so that such legislation, if enacted, does not impair the obligation of the contract with-

in the meaning of the limitation." *Sliosberg v. New Lork Life Ins. Co.*, 244 N. Y. 482, 155 N. E. 749, 756.

The extent to which legislation may lawfully go in emergencies would certainly sustain Chapter 251, Laws of 1932, if resort must be had thereto. We do not think it necessary to invoke the emergency powers in order to sustain this statute because there was in fact no impairment of the contract rights involved therein. The Supreme Court of Mississippi in its majority opinion in this cause held that this statute was "remedial in its nature and operation, among a number of representative acts devised in the attempt to meet, in so far as practicable, the unusual conditions brought about by the present economic depression, the most serious within the present generation, and in the effort to salvage something from the general wreck of things." (R-111).

That the exercise of this paramount sovereign power by the states for the purpose of reopening banks and relieving conditions was reasonable is shown by the fact that it has had quite a general use among various states as conditions have arisen in these states making it necessary.

Following the collapse of the land boom in Florida, the legislature of that state in 1927 enacted Chapter 11849 authorizing the reopening of closed banks under freezing of deposits agreements. The act authorized the comptroller, upon the petition and consent of 75% of the total deposits, to reopen banks and to freeze deposits. This statute has been before the Supreme Court of Florida in more than one case, but the fullest discussion thereof by that Court seems to be in the opinion in the case of *McConville v. Fort Pearce Bank &*

Trust Company, 101 Fla. 727, 135 So. 392 (1931). In that case, a depositor sued the reopened bank for the amount of his deposit, and the bank pleaded that the comptroller took possession of it and thereafter, on the petition of 75% of the depositors, entered his order freezing the deposits, directing that 5% of the deposits be paid on reopening of the bank and 45% in certificates of deposit due on or before 3 years, and the remaining 50% to be paid from the proceeds obtained from slow and doubtful assets set aside for the benefit of depositors, and that it was ready to comply with the order so made. Demurrer to the plea was filed for a number of reasons not here important, but also because the plan deprives the plaintiff of his property without due process of law and impairs the obligation of contracts. The demurrer was overruled, final judgment entered dismissing the case, and appeal taken. The court, in discussing the question of impairment of the obligation of contract, said:

> "It is well established that all contracts are inherently subject to the paramount powers of the sovereign, and the exercise of such powers is never understood to involve their violation. The statute here involved is not within the provision of the constitution forbidding the state to pass laws impairing the obligation of contracts."

The Court also held that banks are indispensable agencies through which industry, trade, and commerce are carried on, and are of a public nature and subject to statutory regulation for the protection of the public.

On the question raised by the plaintiff that he did not sign the agreement to freeze the deposits, the Court said:

"It cannot be seriously contended that depositors may not apply the composition agreement plan heretofore recognized and applied to other creditors of bankrupts . . ."

The Court held that all depositors of banks should be treated as a class, on the theory that what is for the best interest of a class as a whole may be properly imposed by the comptroller as one of the conditions for reopening the bank. In conclusion, the Court upheld the statute as valid.

During the period of deflation of farm values in the early 1920's, certain northwestern states enacted statutes authorizing the reopening of banks on certain conditions, among which was South Dakota. In its essential aspects, the statute of South Dakota is the same as that of Mississippi. The Supreme Court of that state had under consideration their statute in the case of *Farmers & Merchants Bank v. Tomlinson*, 55 S. D. 185, 225 N. W. 305. In that case the facts were: On November 6, 1927, the bank went into liquidation, and on February 5, following, the Superintendent of Banks, on a petition representing more than 80% of the amount of depositors, executed an agreement for a re-organization plan. The proper court entered an order to show cause on February 15 why the bank should not be reopened under the plan, and why the nonconsenting depositors should not be held subject to the terms of the agreement. Notice was given by publication in one issue of a daily paper, and on the return day certain parties appeared and objected, pleading that the law under which the proceedings were had was unconstitutional as impairing the obligation of their contract as depositors with the bank, and as depriving them of their property without due process of law.

The trial court overruled the objections and approved the order of the Superintendent of Banks in reopening the bank, in accordance with the provisions of Chapter 104, Laws of 1925, and appeal was taken to the Supreme Court. On the question of notice, the court held that the notice which actually enabled the appellants to get into court and present their case was sufficient. In the case at bar, actual notice was served on one of the appellants and the other had sufficient notice to enable her to file objections and be heard, although, of course, they were already in court in the liquidation proceedings under the notice given therein to all depositors and creditors, as required by the liquidation statute in force before the enactment of Chapter 251, Laws of 1932. The Supreme Court of South Dakota, on the question of impairment of obligation of contract, referred to the decision of the Supreme Court of Minnesota in *Hoff v. First State Bank,* 174 Minn. 76, 218 N. W. 238, and adopted as its own the conclusion of the Minnesota Court and held that the objections to the constitutionality of the statute were untenable. In conclusion the Court said:

> "The constitutionality of the law rests upon the same principle which federal and state insolvency laws permitting composition of an insolvent's debts are held constitutional."

In the Minnesota case of *Hoff v. First State Bank,* 174 Minn. 76, 218 N. W. 238, followed by the Supreme Court of South Dakota, there was involved the constitutionality of Chapter 28, Laws of 1925, of Minnesota authorizing reorganization of banks in liquidation. In that case the court, in language particularly pertinent to the situation existing in Mississippi, said:

"Due to the financial situation existing at the time, and since the law was passed, many state banks were then in course of liquidation, or have since failed, and many such banks (stated in one of the briefs to be 28 in number) have been reorganized and reopened pursuant to this law. The question presented is therefore important, and affects many banks and individuals. The law is remedial. Its purpose was to meet the existing situation and assist and benefit depositors and unsecured creditors of these banks, by giving them an opportunity to work out of their difficulties with less loss and to better advantage than the carrying through liquidation by the commissioner."

Again the court said:

"The supervision and control of the state over the business of state banks, as well as over the liquidation of such banks, concerns a matter of vital public interest and affects the public welfare. If legislation on such subjects reasonably tends to promote the best interests of the creditors of such banks and the public, then it should not be held to unreasonably or arbitrarily restrict the liberty to contract within the law in force when such contract is made. A business in which the public has an interest or use, and which affects the public welfare, is subject to regulation by statute."

Again the court said:

"Whatever may have been the status of banks in ages past, when but few people had money therein, the use of banks has now become so general and necessary that they practically become public institutions."

And again the Court said:

> "The Commissioner of Banks, when he has taken over an insolvent state bank, represents and acts for the bank and its stockholders and creditors as well. He is a state officer designated for such purpose. The commissioner, when he approves a reorganization agreement, is so acting for the bank and its stockholders and creditors. He is presumed to be an impartial agent for that purpose, and to act fairly, impartially, and justly."

The Minnesota Court held that its statute neither impaired the obligation of contracts nor denied anyone due process of law.

The Supreme Court of Minnesota had before it for the second time the constitutionality of its bank reorganization statute in the case of *Paul v. Farmers & Merchants State Bank*, 187 Minn. 411, 245 N. W. 832. In that case the facts were: Plaintiff brought suit to recover the amount of a draft purchased by him from the defendant bank prior to its closing. He did not consent to the reorganization and reopening of the bank under the agreement executed pursuant to the law, which agreement had been entered into by 90% of the depositors and unsecured creditors of the bank. The Court said that the law provides that a closed bank may be reorganized and reopened under a plan and agreement of 90% of the depositors and unsecured creditors of the bank when approved by the Commissioner of Banks, and that all other depositors and unsecured creditors are bound by such agreement the same as if they had joined in the execution thereof. The Court then said:

> "A brief statement as to the scope and effect of that decision (*Hoff v. First State Bank*, supra,)

may be of value. In that case plaintiff brought suit to recover on a certificate of deposit against the bank, which was, at the time the action was brought, doing business, and presumably solvent. Plaintiff stated a cause of action in his complaint by alleging the issuance of the certificate of deposit, that it was past due, and that payment had been refused. Defendant, by its answer, alleged that after the issuance of the certificate of deposit the bank became insolvent and was closed and taken over by the Commissioner of Banks; that thereafter the bank was duly reorganized and reopened under the law we have cited, under an agreement whereby 90% of the depositors and unsecured creditors agreed to a 50% reduction in their claims. A demurrer was interposed to this answer, and overruled by the trial court. We sustained the order overruling the demurrer, thereby holding that the answer stated a good defense. We said in that connection that the action of the Commissioner of Banks was not conclusive against nonassenting creditors, and that they might, by suit or appropriate action, contest the validity of the act of the commissioner. Except on constitutional grounds, no suggestion or claim is made in the present case that the reorganization agreement and proceedings were irregular or invalid, so that question is not presented."

The Court entered judgment giving the plaintiff 40% of the amount of his claim, in accordance with the reorganization agreement.

A like statute was under consideration by the Court of Appeals of Kentucky (the court of last resort in that state) in the case of *Dorman, Bank Commissioner v. Dell,*

245 Ky. 341, 52 S. W. (2nd) 892. In that case the Court held that a statute permitting three-fourths of the depositors, with the banking commissioner's approval, to reorganize an insolvent bank, would not impair contract rights of depositors not agreeing to reorganization, since depositors have no absolute right to continue liquidation when that course becomes unnecessary to secure their rights. In discussing claim of impairment of obligation of contract between the bank and its depositors by reorganization statute, the Supreme Court of Kentucky said:

> "It is said that when a bank closes its doors if a depositor thereof has a claim against it for the amount of his deposit which constitutes property subject to his control, that the provision of House Bill 84 deprives the minority depositors of the right of control over such property, and makes it absolutely subject to the arbitrary power of the three-fourths majority of the depositors. The argument is fallacious. The 75% of the depositors that concur in the reorganization agreement do not have absolute or arbitrary power over the rights of the other depositors. The bank is insolvent and unable to perform its contract with the depositors. Each of the depositors has a claim against the bank, to be paid out of the assets. It is certain that the depositors are confronted with a condition that may result in a loss. The contract with the depositors is not impaired by the statute, which seeks merely to provide means for the mitigation of the losses already incurred. If it is possible for a reorganization to be perfected, the loss of each depositor may be lessened. The act does not authorize the confiscation of any property. Any plan of reorganization must be sub-

mitted to the banking commissioner and his approval or disapproval must be obtained, and his action is subject to review by the circuit court and by this court. The officer has authority and it is his duty to protect all of the depositors. The majority, no less than the minority, must be considered. If all of the depositors should agree upon a reasonable plan of reorganization, certainly no one could say that contract rights were unconstitutionally impaired. If any of the depositors do not join in the plan, other provisions may be made for the protection of their just rights. The sufficiency of the protection afforded would be a proper subject for consideration by the commissioner, and if his acts were unsatisfactory to anyone concerned, the circuit court is empowered to review them. The depositors have no absolute right to continue liquidation when that course is no longer necessary to secure their rights. The act does not authorize three-fourths of the depositors to reorganize the bank without regard to the rights of the minority, nor does it allow one-fourth of the depositors to defeat the purpose of the remaining three-fourths."

And again the Court said:

"In view of these considerations, there is no room for complaint that due process of law is denied by consenting to the commissioner to grant a reasonable time to the parties vitally interested to work out a plan of their own."

The Supreme Court of Kentucky had this statute before it again in the case of *Milner, et al v. Gibson, et al*, 249 Ky. 5941, 61 S. W. (2nd) 273. In this case the Kentucky Court reexamined the statute authorizing re-

organization of banks then in liquidation, and in a full and well reasoned opinion, fortified by many authorities, upheld the validity of the statute against all constitutional objections. In the course of its opinion the Court said:

"It is also insisted that the act of 1932 is within the inhibition of the due process clause of the Constitution of the United States (Amendment 14). The ultimate purpose of both the act of 1912 and of 1932 is remedial, to enable the depositors of an insolvent bank and trust company, to retrieve the assets, and avoid a loss of their claims against it, by and through the instrumentality of the banking and securities commissioner.

"Under the Act of 1912, when an insolvent bank, or combined bank and trust company, was placed, by the board of directors as provided by Section 165a-18 thereof, in charge of the banking and securities commissioner, and after he assumed charge of it and of the possession of all of its assets and property of whatever nature, then all rights of whatever nature vested in the banking and securities commissioner and the only remaining right of the depositors was the right to verify, present their claims, grieve, and hope to receive their ratable share in the distribution of the assets by the commissioner, or his deputy, in the manner and within the time required, in his discretion, subject to the supervision of the courts. Also under the act of 1912, the banking and securities commissioner, in the exercise of a sound discretion, may compromise or settle any claim in favor of, or against, the corporation, retain and collect the notes, bills, choses in action, or securities owned

by the institutions, which make up a part of its assets, or if, in the exercise of his discretion, he deems it best, he may sell the same, including the real estate owned by it, without the consent and approval of the depositors and other creditors. *Cumberland State Bank v. White,* 222 Ky. 126, 300 S. W. 339; *Cartmell v. Commercial Bank & Trust Company,* 153 Ky. 798, 156 S. W. 1048; *Ex parte Smith,* 160 Ky. 83, 169 S. W. 582; *American Southern National Bank v. Smith,* 170 Ky. 512, 186 S. W. 482, Ann. Cas. 1918B, 959; *Jennings v. Fidelity & Columbia Trust Company,* 240 Ky. 24, 41 S. W. (2nd) 537; *Fletcher's Cyclopedia of Corporations,* Chap. 61, Sec. 4840; *Dorman v. Bell,* 245 Ky. 34, 52 S. W. (2nd) 892. The act of 1932 does not lessen his power. A reorganization under it does not deprive the depositors of existing rights, nor impair any contract enforceable by them, for after going into liquidation they no longer have any existing contractual rights to be impaired. In fact, they thereafter have only the restricted rights afforded them by Section 165a-17, subject to the review of the courts. They have no absolute right to continue liquidation when that course is no longer necessary or adequate to secure their rights. *Dorman v. Dell,* supra. If any contract or right of the depositors is affected or impaired, it is not by the act of 1932, but will be the fault of the plan of reorganization which we shall hereafter consider.

"When a reorganization plan is approved by the commissioner, either with or without a decree of court, and the plan is permitted to be executed, and the bank reopened, such acts in essence and in effect are a sale of the assets of the bank in his

charge, for and in consideration of the reopened bank paying to the depositors and other creditors the agreed price therefor as set forth in the plan of reorganization. The power thus exercised by him under the supervision of the court is equivalent to that which he, with the advice of the court, may exercise under the act of 1912, without the aid of the act of 1932. *Jennings v, Fidelity & Columbia Trust Company,* 240 Ky. 24, 41 S. W. (2nd) 537. The values of the assets of the bank, or bank and trust company, included the liability of the officers for negligence, fraud, or other wrong doing as well as the claims against the stockholders for their double liability, are presumed to be within the knowledge of the commissioner when he approves the plan of reorganization, either with or without the direction of the court, and the values thereof are presumably taken into consideration by him when consenting to the reorganization and reopening of the bank, and by the court when directing him to do so, and thus the depositors and other creditors obtain the benefits thereof, by and through the reorganization and reopening of the bank. In respect to the double liability of the stockholders this liability continues to the amount of the reorganized capital stock after the reorganization, for the protection and security of the depositors and other creditors, and exists by reason of the plan of reorganization, although they may be different individuals. It is neither thereby lost or surrendered. Instead of impairing their rights, the act of 1932 bestows upon the depositors and creditors a privilege, not existing *anterior* to its enactment, of participating in the restoration of the control of the

assets of the bank to sympathetic, interested parties and removing that of the antipathetic, disinterested liquidating agent and his assistants."

And again in the opinion in discussing the question of due process and notice, the Court said:

"The depositors who formulated and signed the plan of reorganization, after it was presented to and vetoed by the banking and securities commissioner, filed a petition in the circuit court of the county in which the Hardinsburg Bank & Trust Company was located and in which the proceeding was pending relating to the liquidation of the bank. The act of so filing their petition in the Breckinridge circuit court was authorized by and in conformity with Section 165a-17. All depositors who had theretofore filed their claims against the bank were parties to the liquidation proceedings at the time of the filing of the petition of the agreeing depositors, and the nonconsenting depositors can not complain of the absence of further or additional notice of the filing of the petition. *Hughes v. Marvin,* supra. The Breckinridge circuit court had exclusive jurisdiction of the parties and the subject matter. *Barr v. Dorman,* 249 Ky. 367, 60 S. W. (2nd) 939, decided May 23, 1933. The statute authorizing the filing of the petition under Section 165a-17 does not provide for, nor require, the issuance of process thereon, as required by the civil code of practice in civil cases. Parties to such proceeding pending in court must at their peril take notice of the application of other parties thereto, in open court, for any relief to which they may conceive they are entitled. The objection of the nonconsenting depositors and the banking and securities

commissioner to the proceedings of the court on the ground that process was not issued after the filing of the petition, and served on each of them, before the court proceeded to hear and determine the propriety of approving and directing the commissioner to approve the plan of reorganization and opening of the bank, is not available. The argument presented that the special demurrer was improperly overruled is equally without merit. The objecting depositors filed an answer to the petition and afterwards entered a motion to withdraw certain portions of it. It is also insisted that the action did not stand for trial at the time of the rendition of the judgment. The basis of these contentions is that the rules of practice and procedure as prescribed by the Civil Code of Practice in civil actions should be adhered to by the parties and the court when the petition is filed as authorized by Section 165a-17. The rules of practice and procedure prescribed by the Code should not be regarded as supplemental to, nor to supplant, the procedure authorized by Section 165a-17. Simple, expeditious procedure is contemplated by this section for the benefit and protection of the depositors."

Maryland has enacted a reopening of banks statute and the validity thereof was before its court of final resort in the case of *Nagel v. Ghingher, Bank Commissioner*, ____ Md. ____, 171 Atl. 65. In that case the facts were: Three depositors brought suit against the Bank Commissioner and Union Trust Company alleging that they deposited money with the Trust Company upon the agreement that they could withdraw it upon demand. That they had been unable so to do since February 24, 1933, because the state on that day proclaimed a bank

holiday, which continued until March 4, 1933, when the bank was taken over by the banking commissioner for liquidation.

Further, that on May 29, 1933, a reorganization plan was formulated, which plaintiffs refused to accept. They asked (1) for an injunction restraining the carrying out of the plan, (2) that the statute providing for reorganization of banks be declared unconstitutional, and (3) that the plan be declared illegal and void.

The statute of Maryland, briefly stated, provides for a reorganization plan to be worked out by the board of directors and then by them filed with the bank commissioner. If he approves of the plan he gives notice by publication for two weeks thereof, and by mailing notices to depositors. If any depositor shall not in 30 days approve the plan he may apply for the ascertainment of the fair liquidating value of his claim, which shall be paid either in money or kind. The court may, in lieu of fixing cash value, apportion to objecting parties their distributive share in the assets of the bank. But, unless 33 1/3% in interest of depositors and unsecured creditors file such application, the plan is to be binding on all, both consenting and non-consenting depositors, the same as if they had assented.

We quote from the opinion of the court as follows:

> "The second objection urged against the constitutionality of Section 711 is that the section provides no standard for a reorganization plan to be proposed by the directors or approved by the commissioner. It would have been impracticable for the statute to have erected explicit standards to govern the board of directors in the formulation of a plan of reorganization. The financial affairs of

the numerous banking institutions present independent problems with respect to every one, since they differ in capital, assets, and liabilities, in the scope and nature of their financial operations, in their organization, management, and field of activity. It violates no principle of law to delegate to the governing body of a financial institution the preparation and proposal of a plan of reorganization, and then to require its presentation to the bank commissioner to study and investigate the plan, and to make his approval necessary before the plan may be submitted to everybody in interest for their acceptance or disapproval. The method prescribed assures that the plan will originate with the officers of the banking institution who are charged with the duty and have been administering its affairs and are most familiar with its resources and its capacity to operate in the way planned; and, also, assures an official study and investigation of the plan by the bank commissioner, a state official designated to approve or disapprove the plan in the exercise of a sound discretion. Thus the problem of reorganization is first formulated by the board of directors and then submitted to every interest, with the power of one-third in interest of those affected to defeat the proposal. The method is simply an extension of the principle in corporate affairs that the majority decides and rules."

And again the Court said:

"The provisions of the section contemplate a reasonable exercise of power conferred, and afford no sound basis for objection on constitutional grounds."

Nebraska also in 1929 adopted an amendment to the state banking laws authorizing reorganization of banks which had been taken over for liquidation. This statute has been construed by the Supreme Court of Nebraska in the case of *Barber v. Bryan*, 123 Neb. 566, 243 N. W. 834. In that case, the Supreme Court of Nebraska held that an insolvent state bank, closed by the department of trade and commerce, may be reorganized and reopened at the instance of creditors holding 85% in amount of the claims against it, and that the agreement entered into by such percentage of creditors is binding on the non-consenting creditors.

Our examination has not disclosed statutes of a like kind enacted by any states other than those heretofore discussed, and in each of the states having such statutes the courts of last resort have upheld them as against the identical attack as is made here against the Mississippi statute.

Our own court has upheld a statute regulating banks which more nearly impaired the obligation of contract than does Chapter 251, Laws of 1932. In the case of *Love v. Mangum*, 160 Miss. 590, 135 So. 223, suit was brought against Love, as Liquidator in the insolvent D'Lo Guaranty Bank, seeking to compel him to issue to Mangum an interest bearing guaranty certificate for the amount of his deposit, as provided by law before the enactment of Chapter 22 of the Laws of 1930, instead of a non-interest bearing certificate as provided by that statute. Mangum claimed that the Act of 1930 impaired the obligation of a contract and deprived him of a vested right to the issuance of an interest bearing guaranty certificate. The Court, after approving the holding in the cases of *Abie State Bank v. Weaver*, 282 U.

S. 765, 75 L. Ed. 690, and *State v. Smith, State Superintendent of Banks,* 234 N. W. 764 (S. Dak.) said in conclusion:

> "Both the old and the new bank guaranty statutes are mere police regulations; under them appellant acquired no contract rights, either with the state, or with the other state banks. Neither, for the same reason, did he acquire any vested right under the old statute which was in anywise taken away from him by the new statute."

So, for the same reason we earnestly contend that Chapter 251, Laws of 1932, took away from the appellants no rights vested in them under the old law, and that they had no contract which is impaired by the statute in question.

Although the Congress is not inhibited by certain constitutional provisions that apply to state legislation, yet, the fact that the Congress of the United States enacted a law very similar in its provisions to the Mississippi statute controlling reorganization of national banking associations (Act March 9, 1933, Section 207, as amended by acts of May 20, 1933), makes manifest that the provisions in the Mississippi statute contained, are reasonable and just, and not arbitrary and without reasonable relation to the end sought to be attained. That the Congress and the legislatures of various states have seen fit to enact similar laws for the reopening of closed banks, is a potent argument not only for the public necessity for such legislation, but also that conditions existed throughout the country giving occasion for the exercise of the police power of the legislature in the promotion of the public welfare.

Not only does Chapter 251 of the Laws of 1932 promote the common welfare by providing a method of reopening banks, and thereby ridding communities of the depressing effect thereon of a closed bank, but it also illustrates the exercise of the police power reposing always in the state. The effective exercise of this power to attain an end which is to the best interest of all creditors of a like class in a bank, may not be frustrated by a small minority who dissent for no valid reason, but claim certain abstract rights which, under existing conditions, can never be realized. The law gives to the dissenters protection from improvident and inequitable schemes by requiring that the plan of reopening shall first be approved by 75% of the depositors, and next by the Superintendent of Banks, and then by the Chancellor, after the plan and all the facts have been laid before him. The law protects the minority, but at the same time it also protects the 75% majority who are equally entitled to protection in their rights. No plan of reorganization could ever be worked out where the assent of all depositors had to be secured. It is to be remembered that this was a proceeding instituted by 75% of the depositors, and then formally presented to the Chancery Court by the Superintendent of Banks, a state officer representing the people of the state, and as liquidator of the bank representing creditors and depositors. It was not a proceeding on the part of the old bank to scale down its debts as appellants would make it appear. The bank was not a party to the proceeding which was essentially one *in rem*. The petition was filed by the Superintendent of Banks and a supporting petition was filed by the depositors' committee asking that the plan of reorganization be approved. Nowhere in the record does it appear that the bank asked any relief.

Can it be said that a Sovereign State can be prevented from acting for the public welfare and the best interest of the whole of the creditors because a private contract may be alleged to be impaired thereby? It has long been held that the state may not be restricted in the exercise of its power because of some private contract becoming incidentally affected thereby. The opinion of the Mississippi Supreme Court in this case well answers this in the following language:

> "And to say that so long as a minority, however small, objects, no arrangement may be made by which the stockholders statutory liability may be transmuted into another form of substantial assurance, given upon fair and reasonable consideration furnished in the arrangement by the particular stockholders immediately concerned, and producing greater benefits to the depositors, and that no law can so contemplate or authorize, although passed in the vital interest of public welfare, and for the distinct good of the greater number of those in immediate beneficial interest, would be to deny the right of the state to legislate in a reasonable and practical manner in respect to matters even of a public nature, and of a distinctly public concern, because there may be a formal intrusion thereby upon the literal terms of the constitutional provisions in reference to the impairment of contracts . . . In considering the constitutional guaranty against impairment of contract, courts now definitely look to substance rather than to form,—realization upon the value or worth of the contract is the concern of the guaranty, not that any particular method for that realization will be observed or preserved." (R-114.)

IV.

CHAPTER 251 OF THE LAWS OF 1932 WAS DECLARATORY OF POWER INHERENT IN THE CHANCERY COURT.

While Chapter 251 of the Laws of 1932 is the basis for the decree in this case, it may not be successfully challenged as unconstitutional legislation, for it is but a legislative declaration of power already and always inherent in Courts of Chancery since their first development.

When the bank was placed in liquidation under the jurisdiction of the Chancery Court it was in virtual receivership and the Court had the right to exercise all the powers that a court of equity might exercise in a receivership pending before it. As hereinabove stated upon the closing of the bank the depositors lost their individuality and became members of a class. From that time on the Superintendent of Banks was the Receiver or Trustee of the assets of the bank for the benefit of all the creditors and depositors as a class and the creditors became the *cestui que trustents.* In discussing a similar statute the Supreme Court of Florida in the case of *Becker v. Amos,* 105 Fla. 231, 141 So. 136, uses the following language:

> "The act is subject to the construction, that the assets of said bank as of the time of 'freezing' are assets held by the Comptroller for the benefit of the creditors of said bank, who thereupon became and are the *cestui que trustents;* that the Comptroller as trustee has the option of administering said trusts fund for the benefit of the beneficiaries, himself through his liquidator, or might surrender the bank upon conditions as might be approved by him,

and in the event petition and consent in writing of those persons representing 75% of the total depositors of said bank, should order all deposits frozen upon such terms and conditions as he may fix; thereupon, instead of him, the Comptroller, the bank itself would become the administrator of said trust estate ..... "

While this refers to the 75% Law the relation existing between the Comptroller, (in Mississippi the Superintendent of Banks) and the depositors is the relation which was created when the bank closed and was placed under the jurisdiction of the Court for liquidation. As stated by the Court in the *Christensen case,* supra, authority to act must be vested in some person and the Legislature has seen fit "to confer upon the Superintendent of Banks and the Chancery Court the discretion and judgment to take such action as under such discretion would best promote the general welfare." The purpose of the law providing for liquidation, which was largely Section 3817, was to place the assets of insolvent banks beyond procedure by individual action and put authority to act in a designated officer. It was the purpose of the law in providing for liquidation that all acts thenceforth should be for the benefit of the creditors as a class and to prevent creditors from seeking individual advantage. Section 3817 gave the right to the Superintendent of Banks with the approval of the Court to sell and dispose of property of the bank. This was construed in the *Christensen case,* supra, as giving the Superintendent of Banks and the Court the right to sell the assets in whole or in part, which has been discussed hereinabove. It cannot be doubted that there was carried with the rights covered by Section 3817 the power for all settlements and dealings with reference to the

assets of the insolvent bank as might best promote the interest of its creditors. The Superintendent of Banks, with the approval of the Court, had the right under this section to make settlement with a debtor on a compromise basis. If this were not so the liquidator could only collect the debt in full or not at all. A great many of the assets would be worthless because it must needs be that many of the assets were not wholly good, else the bank would not have been insolvent. If the Superintendent of Banks and the Court had the right to act in individual cases to do that which would promote the best interests of the creditors as a whole, it must follow that they would have the right to do the same thing on a larger scale; and if an arrangement could be made whereby more would be realized out of the assets for the creditors than would be realized from forced liquidation, it would be a reproach to the law that the authority set up by the Legislature and vested with judgment and discretion should be powerless to do that which was to the best interest of its *cestui que trustents* and would be confined to the less desirable method of forced liquidation.

In the administration of a receivership under its jurisdiction a court of equity has the inherent power to do that which is to the best interest of all of the creditors interested in the receivership and affected thereby. Really Chapter 251 of the Laws of 1932 is but a Legislative declaration of this power. The Court had the power before Chapter 251 was enacted. This is demonstrated by the decision of the Court in the *Christensen case,* supra, in which the transfer of assets occuring prior to the enactment of Chapter 251 was upheld as valid.

The power to administer receiverships for the best interest of the creditors has always reposed in the courts of equity. In the early days, the occasion for the exercise of such power never arose because there had not been such a development of human relations to call for it. The fullest expression of this power is found in the exceptionally well reasoned case of *Phipps v. Chicago R. I. & P. Co.*, 284 Fed. 945, 28 A. L. R. 1184, in which Justice Sanborn of the Eighth Circuit Court of Appeals cuts through form and decrees that which is equity and which best promotes the interest of the creditors concerned. In that case it was held that a Court which through its receiver takes possession of an insolvent Railroad corporation may compel unsecured creditors to submit to a plan of reorganization by which they will receive their fair share of the property of the corporation in stock and turn the property back to the reorganized company without resorting to a judicial sale and restrain the creditors from resorting to any other method of collecting their claims. In that case a Railroad company with a large amount of indebtedness was placed in the hands of a Receiver. A reorganization was projected to which a large per cent of the creditors, secured and unsecured, and stockholders agreed, and in the reorganization plan it was represented to the Court that it should decree the delivery of the property back to the corporation, reorganized according to the plan without judicial sale and protect the reorganized company and its property against liability to pay in full in cash claims of unsecured creditors who should decline to agree to the plan. In the statement of facts prepared by Judge Sanborn himself, it was said "after careful consideration the Court concluded that it had the power and that it was its duty

so to do, and rendered its decree to that effect." In the opinion of the Court, Judge Sanborn treats the common creditors as *cestui que trustents* of the Court as we have argued hereinabove. In the opinion he reviews the progress of the law through the courts relative to such insolvent corporations and receiverships, citing a number of leading cases and shows that reorganization efforts were first undertaken through judicial sales, but traces the progress of the law to show that the Court was not restricted to a judicial sale to secure the most equitable and beneficial results for its *cestui que trustents*. As a matter of fact it shows that the main consideration was the securing of that which was best for the creditors, and unless this was done even the fixing of a judicial sale was unavailing. The substance of this decision is expressed in the following language:

> "That in the foreclosure cases the courts proceeded by sales, as we have seen, added nothing to the validity of or effect of their decrees, or of the title they transferred to the purchasers. That the Courts in the foreclosure cases transferred the properties to new corporations, which the creditors and stockholders of the insolvent corporation through their stocks and bonds of the new corporation which they received for their equitable shares in the property of the old corporations, owned, possessed, controlled, and directed, while the courts in the case in hand delivered the property they administered back to the empty shell of the former insolvent corporation so reorganized as to be solvent, which solvent corporation the creditors and stockholders of the insolvent corporation owned, possessed and controlled through the stock of that reorganized corporation, which they received for their equitable

shares in the property in the insolvent corporation is an immaterial difference. The courts in this case had the same power to vest in the reorganized solvent corporation the title to the property of the insolvent corporation, free from the claims against and stock in the latter, and to bar actions and suits against the reorganized corporation and against the property they delivered to that corporation that the courts in the foreclosed cases had and exercised to protect the new corporations and the property which they delivered to them against like claims. And the conclusion of the whole matter is that the decree of the, United States District Court of the Northern District of Illinois, whereby that court adjudged that the property of the insolvent company should be delivered back to that corporation so reorganized as to be solvent without a sale, and that the unsecured creditors and stockholders of the insolvent company were enjoined and forever barred from interfering with or maintaining claims, actions or suits against the property so delivered or against the reorganized company, on account of such claims against or stock in the old insolvent corporation, in any other way than that specified in that decree was far within the jurisdiction and power of that court and was fair, equitable and just."

This decision has furnished the rule which has been followed in a number of other reorganizations.

If a Railroad company, in receivership, can be reorganized by surrendering the property of an insolvent corporation to a reorganized solvent corporation in which the creditors benefit on the basis of their claims, a *fortiori*, a court of equity in which an insolvent bank is being liquidated has the inherent power to direct the

return of its assets to a reorganized bank with additional capital upon a plan whereby all of the assets of the bank are to be liquidated by it and paid over to the creditors pro rata, and especially when it is shown to the Court that the creditors will receive more in this way than they would receive by forced liquidation. The Court has the right when convinced that it is to the best interest of all to bind all by its action in so doing. Unless it can do this, it has lost some of its original and inherent power. If it is to be checkmated in doing that which is to the best interest of the creditors as a whole by the dissent of a few, the purpose of putting the liquidation under its jurisdiction is largely frustrated. All creditors are in a court of equity and it has ample power to force them to do equity and thereby prevent individuals from defeating a plan for the best interest of all.

The Supreme Court of Mississippi held in the *Christensen case*, supra, that the Superintendent of Banks, with court approval, had the right to sell the assets of the bank in liquidation to a reorganized bank to operate under another charter. Following the rule announced by Judge Sanborn in the case of *Phipps v. Chicago R. I. & P. Co.*, supra, the Court had ample power to decree the return of the assets of the insolvent bank to a reorganized, solvent bank under the old charter under a plan whereby the creditors would receive the full benefit of all the assets of the old bank. And the Supreme Court of Mississippi in the decision in the case at bar held that what occurred in the *Christensen Case*, supra, was in effect a reorganization proceeding. And this in full view of the fact that in the *Christensen case* the transfer was to a bank with separate corporate franchise.

Leaving out of view the so-called pooled assets, including $90,000.00 stock liability, which were left in trust for the benefit of all depositors, when we look through form to substance what was effected by the decree was the sale of the assets of the liquidation including stockholders liability at a fair price to a new reorganized and solvent corporation with a new capital structure provided in cash by its stockholders, which corporation took up its abode in the empty shell of the old and insolvent corporation and assumed its corporate name.

V.

APPELLANTS WERE NOT DEPRIVED OF DUE PROCESS OF LAW.

There is in this case no basis for the objections that appellants were denied due process of law, nor that their property was taken without due process of law. The requirements of the United States Constitution were fully met in the proceeding which is before this Court for review.

In the case of *Hardware Mutual Fire Insurance Company v. Glidden*, 284 U. S. 151-158, 76 L. Ed. 214, 219, the Supreme Court of the United States held:

> "The 14th Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure . . . . . In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adops satisfies the Constitutional requirements of 'reasonable notice and opportunity to be heard.'"

And in the case of *Snyder v. Mass.*, 291 U. S. 97, 78 L. Ed. 674, which was a criminal case, the Court held:

> "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it."

We respectfully submit that when these two requirements of notice and opportunity to be heard were met, the United States Constitution was complied with, and the manner of notice, and the procedure on the hearing were matters to be settled by the Supreme Court of Mississippi, and having done so these matters will not be reviewed in this Court.

This was a proceeding in the matter of the receivership of the closed bank before the Court in which it was pending. That the Court had jurisdiction over the subject matter is not, and cannot, be questioned. It was not a proceeding directly against these appellants, or any other creditor, for the recovery of money, or property, from them, but a proceeding with reference to the assets in which they were beneficially interested, the legal title to which was in the Superintendent of Banks. Except as to amounts on which they might receive dividends, the rights of these appellants were the same as all other creditors. The matter before the Court was the disposition of the assets in a particular way, and was to affect these appellants, and all creditors, alike. The question before the Court was whether or not the plan submitted was for the best interest of all creditors. The receivership had been pending before the Court for more than two years, and appellants had notice thereof and were parties thereto. Before proceeding in the matter the Court selected certain creditors, fifteen in number, out of a total of five thousand, as rep-

resentatives of the creditors as a class, and directed that process be served upon them to appear at the hearing and show cause why the plan agreed upon by the three-fourths majority should not be approved. (Record 22-23). The creditors selected consisted of individuals and corporations, and were a fair cross section of the whole. This was the only practical method of process. To have personally served each of the five thousand creditors would have entailed enormous costs and delay and would have been too cumbersome for reasonable procedure by the Court. Furthermore, the rights of the creditors were the same, and the objections of the few would embrace those of all. Such practice of bringing all parties before the Court by such service has been recognized and followed in the courts of equity both in this country and in England for several hundred years. This rule was clearly recognized by the Supreme Court of the United States in the case of *Wallace v. Adams*, 204 U. S. 414, 51 L. Ed. 547, wherein the Court used the following language:

> "Now, it is undoubtedly within the rights of the court of equity to name as defendants a few individuals who are, in fact, the representatives of the larger class having a common interest and common right, a class too large to be brought into court, and make the decree effective not merely upon these individuals, but also upon the class represented by them." Citing *Mandeville v. Riggs*, 2 Pet. 482, 7 L. Ed. 493, and numbers of other cases.

In addition to such service on the designated creditors personally, the Court further ordered that publication of notice be made for all depositors, creditors and parties in interest, directing them to appear at the hear-

ing, and show cause why the plan should not be adopted. This publication was made, and proof of it appears on pages 23-24 of the Record.

Appellant Doty was served with process, appeared at the hearing, and filed objections. Appellant McCarty was not personally served, but voluntarily appeared and was granted leave to file objections, and their objections were later consolidated. The record shows, page 68, that these parties were represented by counsel at the hearing, and that the matter was heard by agreement of the parties. It further shows that these parties participated in the hearing, and in the examination of the witnesses. The decree shows that they were accorded full opportunity to present evidence in support of their objections, but that they offered none. (Record 46).

In the *Christensen case*, supra, a disposition of the assets of the liquidation on similar terms was made, but without any notice to creditors, or, so far as the record shows, any open hearing, and the Supreme Court of Mississippi sustained the proceeding as valid. In the case at bar the Supreme Court of Mississippi held that all requirements as to notice were well enough observed in the following language:

> "In receivership and in liquidation, such as this, the Court acts in all ordinary administration matters upon *ex parte* petition or motion and without formal notice to the parties in interest. This is a rule of necessity, because usually in these matters there are numerous parties in interest widely scattered, and to require notice of every step to be taken would hinder and embarrass the administration and entangle it in unbearable expense. In matters of great importance, however, vitally affect-

ing the body of the estate, notice by citation ought to be given, and in some jurisdictions the citation is regarded as essential to the validity of the decree in these more important steps in the administration. In *Milner v. Gibson*, 61 S. W. (2nd) 273, it was held, however, that notice was not essential under a reorganization petition in bank liquidation proceedings; and in *Christensen v. Marine Bank*, 150 So. 375, which was in effect a reorganization proceeding, no notice was given. But whether citation under our reorganization statute is required, we are not called on here to decide, because proper citation was in fact ordered and served in the present case; it being necessary to add only that a citation is not required to be served either with the same formality or for the same length of time as a summons. The requirement in respect to a citation is that it be served in a reasonable manner, and for a reasonable length of time, all the circumstances considered, and that requirement was well enough observed in the matter now before us." (R-111.)

VI.

APPELLANTS HAVE NOT SUFFERED ANY DAMAGES.

The appeal in this case, taken without supersedeas, is from a judgment of the Supreme Court of Mississippi affirming a decree of the Chancery Court of Lee County, Mississippi, entered May 17, 1933. The appeal to the Supreme Court of Mississippi was likewise without supersedeas; and upon the entry of the decree in the said Chancery Court it became effective, and the Peoples Bank & Trust Company, as reorganized under the

terms of said decree, was then and thereafter authorized to reopen and proceed under the plan set forth in the decree of the Court. The presumption is that the decree has been executed.

Since that time, Chapter 146 of the Laws of Mississippi, 1934, of which this Court will take judicial notice, has been enacted. This act created a department of bank supervision, and the office of State Comptroller; abolished the State Banking Department and the office of State Superintendent of Banks.

The appellants seek to have reversed a decree which has been effective for almost two years, and to obtain redress against the appellee whose office has been abolished. In order that this may be done, and for the appellants to have standing in court on the claimed invasion of their constitutional rights, the record must show that, by the statute assailed and the decree entered, they have suffered actual damage.

The original petition filed in the liquidation proceedings in the Chancery Court of Lee County, Mississippi, the proof thereon, and the decree of the Chancery Court, make manifest the correctness of the holding in this case made by the Supreme Court of Mississippi that the appellants have not been damaged by reason of the entry of the decree. The opinion of the Supreme Court of Mississippi (R-115) definitely finds that the appellants have not been hurt, or damaged, in any way. And if one has not been damaged he may not complain, whether he base his complaint upon constitutional, statutory, or other grounds. We quote from the opinion of the Supreme Court of Mississippi in this case, as follows:

"We say finally, therefore, of the discussion upon the question of stockholders' liability, and we may have likewise so answered as to the entire of this controversy upon the merits without any elaboration of discussion, that unless the complaining depositor can show that he has been substantially injured in ultimate results, has in fact been actually hurt by the reorganization and the plan thereof, he has no right to complain whether upon constitutional or statutory or administrative grounds.

"It is fundamental in all our laws of Chancery procedure that before any person may complain or sue in any equity court, he must set up a cause of action of which an essential element is that he must show that he has been injured, that what has been done results in actual harm to him; *Federal Land Bank v. Miss. P. & L. Co.*, 157 Miss. 737; and the like rule applies to all those who object to what has been done in any given situation, whether in the Chancery Court or on appeal. This elemental rule fully applies also upon constitutional contentions, as was expressly recognized by this Court in *New Orleans M. & C. R. Co. v. State*, 110 Miss. 290, 305, the Court there having under consideration a constitutional question, and wherein having stated the general rule, as above mentioned, the Court summarized it in the terse expression that, 'one must be hurt before he complains.' The petition in the case now before us showed, the evidence established, and the Court adjudged, that the plan and its execution would result in a substantially greater benefit to the five thousand depositors, of whom only two are the appellants here, than had the plan not been adopted. And the case being, therefore, that

the appellants are not hurt or injured in any substantial way, it follows that they are not in a position to complain."

On the question of whether appellants have been damaged the plan as a whole must be looked to and considered. An apparent damage in one particular aspect of the plan may be more than overbalanced by the advantages accruing from other features of the plan. To illustrate: Any loss that may have been suffered by reason of the compromise settlement embraced in the plan as to stockholders' liability, according to the testimony and the finding of the trial court, is more than off-set by the added value given to the bills receivable, and real estate, and other property owned by the liquidation, and to which alone the appellants were compelled to look for repayment in whole, or in part, of their respective deposits. And the fact that actual damage must be shown before appellants may complain on any ground is discussed in the decision of the Supreme Court of the United States in the case of *John M. Petry v. United States*, (Feb. 18, 1935) 79 L. Ed. 446, (not yet officially reported), wherein the court held that before the plaintiff could recover he must show actual damages. And again in the same decision in discussing the question of whether plaintiff had shown any damages the Court said: "Plaintiff's damages could not be assessed without regard to the internal economy of the country at the time the alleged breach occurred."

In the plan of reorganization of the Peoples Bank & Trust Company, and in the testimony in support of the decree, the Chancery Court had before it, and in determining whether the plan was best for all depositors,

including the appellants, and in deciding whether any depositor would be damaged by the plan, gave regard to the economic conditions in the territory in which the closed bank was located, and the effect of the plan, and the carrying of it into execution on the values of all of the properties owned by the liquidation. On ample testimony, which is wholly without contradiction, the Court found that the plan would be without detriment to any depositor, but on the contrary would be of substantial benefit to all creditors of the bank.

It is a matter of common knowledge that identical assets owned by an open and going concern are more valuable than if owned by a business in liquidation. As was stated by the Supreme Court of Mississippi in the *Christensen case*, supra:

> "It is difficult to collect the assets of a bank in liquidation. It is well known that many obligations due a bank are more easily collected when the bank is a going concern, open and doing business, than when it is done by a liquidating agent or receiver. Liquidation proceedings are highly expensive, and the amounts received by creditors and depositors are usually less than the full demands. In other words, it is the usual thing, in liquidation proceedings, for its stockholders and creditors to suffer losses."

Therefore, we confidently assert that no damage has been shown by the appellants and they are not in position to challenge either the statute or the decree.

CONCLUSION.

WHEREFORE, we respectfully submit that the judgment appealed from should be affirmed.

Respectfully submitted,

C. RICHARD BOLTON,
CLYDE L. HESTER,
HIRAM H. CREEKMORE.

We certify that we have this day personally delivered copies of the foregoing brief to E. C. Sharp and Charles S. Mitchell, Attorneys for the Appellants.

This ..... day of March, 1935.

C. RICHARD BOLTON,
CLYDE L. HESTER,
HIRAM H. CREEKMORE.
Attorneys for Appellee.

APPENDIX "A"

"3817. Liquidation proceedings.—In liquidating the affairs of insolvent state banks taken over by him, the superintendent of banks shall proceed by first filing a petition in the chancery court of the county in which the bank is located, submitting the liquidation of such bank to the jurisdiction of that court and thereafter the liquidation shall proceed under the orders and directions of that court. The chancery court or the chancellor in vacation shall have full jurisdiction to make any and all orders in the course of the liquidation proceedings. The case shall be styled "In the matter of the liquidation of the * * * bank by * * * superintendent of banks," and when the board of directors of the failed bank have passed a resolution consenting to the liquidation of the bank, and requesting the superintendent of banks to take charge of its affairs for the purpose of such liquidation and authorizing an officer of the bank to waive service of process and enter the appearance of the bank to the petition, the superintendent of banks shall thereafter have full and complete control and authority over the assets and affairs of the failed bank, subject only to the orders of the chancery court to which jurisdiction of the liquidation has been submitted. Suit may be instituted by him in his name as superintendent of banks to enforce the collection of any bill or other obligation due the failed bank or to preserve the assets thereof or to enforce any right at law or in equity that might or could have been enforced by the bank as a going concern. And he may employ and retain such of the employees of the bank as he may deem necessary to aid him in the liquidation. By and with the consent of the court or of the chancellor in vacation evidenced by an order entered in the liquidation proceedings he may sell any of the property, real,

personal or mixed, belonging to the bank either at private or public sale, and a deed made by him under the seal and attested by the secretary of the state banking department shall convey to the purchaser all of the rights, title and interest of the bank and of the state banking department in any such property.

"The superintendent shall cause notice to be given by advertisement in such newspaper as he may direct, once a week for six consecutive weeks, calling on all persons who may have claims against the bank (but not including deposits shown by the books of the bank which shall *prima facie* be proven claims) to present the same and make legal proof thereof, at a place and within a time specified in such notice, not less than ninety days from the date of the first publication of the notice. A copy of the notice shall be mailed to all persons whose names appear as creditors on the books of the bank. If the superintendent doubts the justice and validity of any claims or deposits, he may reject the same and serve notice of such rejection upon the claimant or depositor, either by mail or personally, and an affidavit of service of such notice, which shall be *prima facie* evidence thereof, shall be filed in the office of the banking department. An action upon a claim so rejected must be brought by petition to the chancery court having jurisdiction of the liquidation of the affairs of the bank by the claimant within six months after such service or the same shall be barred. Claims presented and allowed after the expiration of the time, fixed in the notice to creditors, shall be entitled to share in the distribution, only to the extent of the assets in the hands of the superintendent at the time claims are filed, without allowance for previous distribution. Upon taking possession of the property and assets of a bank, the superintendent shall make

an inventory of its assets in duplicate, one to be filed in the office of the banking department, and one in the liquidation proceedings in the chancery court. Upon expiration of the time fixed for the presentation of claims, the superintendent shall make in duplicate a full and complete list of the claims presented, including and specifying which claims have been rejected by him, one to be filed in the office of the banking department and one in the liquidation proceedings in the chancery court. Such inventory and list of claims shall be open at all reasonable times to inspection. The compensation of the special agents of the banking department, counsel and other employees and assistants and all expenses of supervision and liquidation shall be fixed by the superintendent subject to the approval of the chancery court, or the chancellor in vacation. When the compensation for the various parties aiding in the liquidation is fixed and approved the same shall be paid out of the funds of such bank in the hands of the superintendent and shall be a prior charge and lien on such assets. The money collected by the superintendent shall be, from time to time, deposited in one or more state depositories. At any time after the expiration of the date fixed for the presentation of claims, the superintendent may, out of funds remaining in his hands, after the payment of expenses, declare and pay one or more dividends to creditors, and as soon as practicable thereafter, he shall declare and pay a final dividend, such dividend, to be paid to such persons and in such amounts and upon such notice as may be directed by the chancery court having jurisdiction of the liquidation. Objections to any claims or deposits not rejected by the superintendent may be made by any party interested, by filing a copy of such objections with the superintendent, who shall present

the same to the court having jurisdiction before the time of the next application to declare a dividend. The court may make proper provisions for unproven or unclaimed deposits. When the superintendent shall have paid to each and every depositor and creditor of such bank whose claim or claims shall have been duly proven and allowed, the full amount thereof, and shall have made proper provisions for unclaimed and unpaid deposits, or dividends, and shall have paid all the expenses of liquidation, all out of the assets of the failed bank, and there still remains in his hands any assets thereof, he shall call a meeting of the stockholders of such bank by giving thirty days' notice by publication once a week for three consecutive weeks in one or more newspapers published in the county where the principal office of such bank was located. At such meeting the stockholders shall elect by ballot an agent or agents who shall wind up the affairs of the bank, and in so determining such stockholders shall vote by ballot, in person or by proxy each share of stock entitling the holder to one vote and the majority vote of the stock shall be necessary to an election, a majority of the stock present and voting in person or by proxy being necessary. Such agent or agents shall execute and file with the banking department a bond in such amount with such security and in such form as shall be approved by the superintendent of banks conditioned for the faithful performance of all the duties of his or their trust, and so conditioned that any party aggrieved may bring or cause to be brought suit on said bond, and thereupon the superintendent shall transfer and deliver to such agent or agents all the undivided and uncollected or other assets of such corporation then remaining in his hands and take a receipt therefor signed by such agent or agents, and upon such

transfer and delivery shall be discharged from any and all further liability to the bank and its creditors. Such agent or agents shall convert the assets coming into his or their possession into cash, and shall act for and make distribution of the property of said bank as is herein provided in case of distribution by the banking department, except that the expense thereof shall be subject to the direction and control of the court having jurisdiction of the cause. In case of the death, removal or refusal to act of any such agent or agents selected by the stockholders the stockholders, on the same notice to be given by the superintendent upon proof of such death, removal or refusal to act, being filed with him, and by the same vote hereinbefore provided, may elect a successor who shall have the same powers and be subject to the same liabilities and duties as the agent originally elected. Dividends and unclaimed deposits remaining unpaid in the hands of the banking department for six months after the order for final distribution (at such rate of interest as is allowed by said state depositories) shall be by him deposited in one or more state depositories to the credit of the banking department in trust for the several depositors in and creditors of the liquidated bank from which they were received, and the superintendent shall pay over the money so held by him to the persons respectively entitled thereto upon being furnished satisfactory evidence of their rights to same. In case of doubtful or conflicting claims, he may require an order from the court having jurisdiction authorizing and directing the payment thereof. He may apply the interest earned by the money so held by him toward defraying the expense in the payment and distribution of such unclaimed deposits or dividends to the depositors and creditors entitled to receive the same. The banking

department shall file annually with the governor of this state a report of the names of the banks taken possession of and liquidated and the sum of unclaimed and unpaid deposits or dividends with respect to each of them respectively, together with a statement of the amount of interest earned by such unclaimed dividends, which reports the governor must submit to the legislature.

"In event the assets of the failed bank are not sufficient to pay the claims of all creditors and depositors in full, then in such event, when the superintendent shall have realized on all of the assets of such bank, and has applied the same toward the payment of such claims in the manner provided by law, he may file with the chancery court having jurisdiction of the liquidation a final report and upon the approval and allowance of this report he shall be discharged from any further liability to the bank and its creditors, except as to the right of depositors to be paid any remaining balance due them out of the guaranty fund as provided by law."

APPENDIX "B."

In the statement of facts by appellants to which reference has heretofore been made, a claim is made that there is a loss of $152,485.90 in assets between the total assets shown on the liquidation statement and the total assets shown in the pool account and in the reopened bank. This is a mere difference in the manner of presenting said statements, and is not in fact a discrepancy of real assets as charged by the appellants.

It will be noted that the statement on page 21 of the Record which shows assets of $1,901,672.92 shows an item of taxes and expenses of all kinds aggregating $109,855.87 as an asset, which, of course, is not an asset

except for the purpose of bookkeeping. This $109,855.87 has been eliminated from the statement on page 21, and on page 24, column 1, will be found a statement after the elimination of the $109,855.87 item. This statement in column 1, on page 24, shows assets of $1,791,817.05, which is exactly $109,855.87 less than shown on page 21. All figures on both statements are the same except that for $109,855.87, taxes and other expenses is eliminated on the assets side, and there is also eliminated from the liability side of the same statement Earnings Account of $87,928.79, which leaves a difference of $21,927.08, between the Earnings and Expense Accounts, which $21,927.08 has been eliminated from the Margin Account, which Margin Account in column 1, on page 24, is this amount less than the amount at which it is carried on page 21. Therefore, this accounts for $109,855.87 of the so-called $152,485.90 discrepancy.

The balance of the so-called discrepancy of $42,630.03, which is the difference between the $152,485.90 and the $109,855.87, which has already been accounted for, is accounted for as follows:

First, $55,000.00 is eliminated from the stockholders' liability account on account of the fact that under the reopening plan of the bank stockholders who paid in 50% of their stock liability to provide capital for the reopened bank were released from the other 50%, which fact is fully set out in the testimony in the record and in the decree authorizing the reopening of the bank. This $55,000.00 added to $109,855.87, above referred to, would make a difference of $164,855.87, whereas, the net difference is only $152,485.90, making an average of approximately $12,500.00, according to appellants' figures, but as a matter of fact there is no overage and this

difference is accounted for by additions to the Loans and Discounts Account, Bond Account, Real Estate Account and Cash Account, which additions aggregate $40,284.97, and after giving effect to the reduction in the stock liability account of $27,975.91, gives an actual net increase in the assets of $12,309.06 as reflected in column 2, page 24, of the Record, which column reflects the statement of the liquidation after giving effect to the $55,000.00 collected for capital stock.

Totals of columns No. 3 and No. 4 should and will equal column No. 2 on page 24 if $55,000.00 is added to the total of these columns No. 3 and No. 4, which is the amount of the stock liability released, and after adding $60.86 to the Overdraft Account, page 24 of the Record, in column No. 4, shows Overdrafs of $4,041.94, which is evidently a typographical error. Same should show $4,101.94, which is $60.86 more than the Overdrafts shown in column 2; therefore, this $60.86 shows up in the difference in the totals of columns No. 3 and No. 4 against the total of column No. 2.

Reconcilement of the total of column No. 2 with the totals of columns No. 3 and No. 4 is as follows:

Column No. 2, total		$1,804,126.11
Column No. 3, total	$1,281,972.47	
Column No. 4, total	467,214.50	
Making total of columns No. 3 and No. 4 of	$1,749,186.97	
Plus amount released from Stock Liability Account referred to above	55,000.00	
Making total of		$1,804,186.97

Less Overdrafts increase referred to above..... 60.86

Making a total of Columns No. 3 and No. 4 of $1,804,126.11

which agrees with the total of this column set out on page No. 24 in the Record.

Therefore, the difference of $152,485.90 charged by appellants is accounted for.